

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

PAUL DAVIS,

Petitioner,

vs.

D.W. NEVEN, *et al.*,

Respondents.

Case No. 2:12-cv-00984-JCM-PAL

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by a Nevada state prisoner. This matter comes before the court on the merits of the remaining grounds of the amended petition.

I. Procedural History

On November 24, 2008, petitioner was convicted, pursuant to a jury trial, of burglary and possession of a controlled substance with intent to sell. (Exhibit 30).¹ Petitioner was adjudicated a habitual criminal and sentenced to life in prison with parole eligibility beginning after 10 years, plus

¹ The exhibits referenced in this order are found in the court's record at ECF Nos. 7, 9, & 10.

1 a concurrent term of 19-48 months. (*Id.*). On February 3, 2010, petitioner's convictions were
 2 affirmed on direct appeal by the Nevada Supreme Court. (Exhibit 44).

3 On February 15, 2011, petitioner filed a *pro se* post-conviction habeas petition in state
 4 district court. (Exhibit 49). On June 22, 2011, the state district court denied the petition. (Exhibit
 5 52). On March 7, 2002, the Nevada Supreme Court affirmed the denial of the petition. (Exhibit
 6 59). Remittitur issued on April 3, 2012. (Exhibit 60).

7 Petitioner initiated the instant action with a federal habeas petition signed on May 25, 2012.
 8 (ECF No. 1). Respondents filed a motion to dismiss the petition on December 12, 2012. (ECF No.
 9 6). On February 8, 2013, petitioner filed a response to the motion to dismiss in which he requested
 10 leave to file an amended petition. (ECF No. 14). On the same date, petitioner's amended petition
 11 was filed by the clerk of court. (ECF No. 13). By order filed June 28, 2013, the court granted
 12 petitioner's motion to file the amended petition and denied respondents' motion to dismiss without
 13 prejudice. (ECF No. 19). The amended petition contains eight grounds for relief. (ECF No. 13).
 14 Respondents moved to dismiss certain grounds of the amended petition. (ECF No. 21). By order
 15 filed February 19, 2014, this court granted the motion and dismissed all grounds of the amended
 16 petition except grounds 1 and 7. (ECF No. 25). Respondents have filed an answer to grounds 1 and
 17 7 of the amended petition. (ECF No. 26). Petitioner has filed a reply to the answer. (ECF No. 30).

18 **II. Federal Habeas Corpus Standards**

19 The Antiterrorism and Effective Death Penalty Act ("AEDPA"), at 28 U.S.C. § 2254(d),
 20 provides the legal standard for the Court's consideration of this habeas petition:

21 An application for a writ of habeas corpus on behalf of a person in
 22 custody pursuant to the judgment of a State court shall not be granted
 23 with respect to any claim that was adjudicated on the merits in State
 court proceedings unless the adjudication of the claim –

24 (1) resulted in a decision that was contrary to, or involved an
 unreasonable application of, clearly established Federal law, as
 25 determined by the Supreme Court of the United States; or

26 (2) resulted in a decision that was based on an unreasonable
 27 determination of the facts in light of the evidence presented in the
 State court proceeding.
 28

1 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications
 2 in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect
 3 to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). A state court
 4 decision is contrary to clearly established Supreme Court precedent, within the meaning of 28
 5 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the
 6 Supreme Court’s] cases” or “if the state court confronts a set of facts that are materially
 7 indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result
 8 different from [the Supreme Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)
 9 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685,
 10 694 (2002)). The formidable standard set forth in section 2254(d) reflects the view that habeas
 11 corpus is “‘a guard against extreme malfunctions in the state criminal justice systems,’ not a
 12 substitute for ordinary error correction through appeal.” *Harrington v. Richter*, 562 U.S. 86, 102-03
 13 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)).

14 A state court decision is an unreasonable application of clearly established Supreme Court
 15 precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct
 16 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that
 17 principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting *Williams*,
 18 529 U.S. at 413). The “unreasonable application” clause requires the state court decision to be more
 19 than merely incorrect or erroneous; the state court’s application of clearly established federal law
 20 must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409). In determining whether
 21 a state court decision is contrary to, or an unreasonable application of federal law, this Court looks
 22 to the state courts’ last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991);
 23 *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000), *cert. denied*, 534 U.S. 944 (2001).

24 In a federal habeas proceeding, “a determination of a factual issue made by a State court
 25 shall be presumed to be correct,” and the petitioner “shall have the burden of rebutting the
 26 presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1). If a claim
 27 has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the
 28

1 burden set in § 2254(d) and (e) on the record that was before the state court. *Cullen v. Pinholster*,
2 131 S.Ct. 1388, 1400 (2011).

3 **III. Discussion**

4 **A. Ground 1**

5 Petitioner alleges that his trial and appellate counsel were ineffective, depriving him of his
6 Sixth Amendment right to the effective assistance of counsel. (ECF No. 13, at pp. 3-4).

7 Ineffective assistance of counsel claims are governed by the two-part test announced in
8 *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a
9 petitioner claiming ineffective assistance of counsel has the burden of demonstrating that (1)
10 counsel's performance was unreasonably deficient, and (2) that the deficient performance prejudiced
11 the defense. *Williams v. Taylor*, 529 U.S. 362, 390-391 (2000) (citing *Strickland*, 466 U.S. at 687).
12 To establish ineffectiveness, the defendant must show that counsel's representation fell below an
13 objective standard of reasonableness. *Id.* To establish prejudice, the defendant must show that there
14 is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
15 would have been different. *Id.* A reasonable probability is "probability sufficient to undermine
16 confidence in the outcome." *Id.* Additionally, any review of the attorney's performance must be
17 "highly deferential" and must adopt counsel's perspective at the time of the challenged conduct, in
18 order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner's
19 burden to overcome the presumption that counsel's actions might be considered sound trial strategy.
20 *Id.*

21 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
22 performance of counsel resulting in prejudice, "with performance being measured against an
23 'objective standard of reasonableness,' . . . 'under prevailing professional norms.'" *Rompilla v.*
24 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an
25 ineffective assistance claim, a federal habeas court may only grant relief if that decision was
26 contrary to, or an unreasonable application of the *Strickland* standard. *See Yarborough v. Gentry*,
27 540 U.S. 1, 5 (2003). There is a strong presumption that counsel's conduct falls within the wide
28 range of reasonable professional assistance. *Id.*

1 The United States Supreme Court has described federal review of a state supreme court's
2 decision on a claim of ineffective assistance of counsel as "doubly deferential." *Cullen v.*
3 *Pinholster*, 131 S.Ct. 1388, 1403 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 112-113,
4 129 S.Ct. 1411, 1413 (2009)). In *Cullen v. Pinholster*, the Supreme Court emphasized that: "We
5 take a 'highly deferential' look at counsel's performance . . . through the 'deferential lens of §
6 2254(d).'" *Id.* at 1403 (internal citations omitted). Moreover, federal habeas review of an
7 ineffective assistance of counsel claim is limited to the record before the state court that adjudicated
8 the claim on the merits. *Cullen v. Pinholster*, 131 S.Ct. at 1398-1401. "A court considering a claim
9 of ineffective assistance of counsel must apply a 'strong presumption' that counsel's representation
10 was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 131
11 S.Ct. 770, 787 (2011) (quoting *Strickland*, 466 U.S. at 689). "The question is whether an attorney's
12 representation amounted to incompetence under prevailing professional norms, not whether it
13 deviated from best practices or most common custom." *Id.* (internal quotations and citations
14 omitted).

15 The *Strickland* standard also applies to claims of ineffective appellate counsel. *Smith v.*
16 *Robbins*, 528 U.S. 259, 285 (2000). Appellate counsel has no constitutional duty to raise every non-
17 frivolous issue requested by the client. *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983). To state a
18 claim of ineffective assistance of appellate counsel, a petitioner must demonstrate: (1) that counsel's
19 performance was deficient in that it fell below an objective standard of reasonableness, and (2) that
20 the resulting prejudice was such that the omitted issue would have a reasonable probability of
21 success on appeal. *Id.* "Experienced advocates since time beyond memory have emphasized the
22 importance of winnowing out weaker arguments on appeal and focusing on one central issue if
23 possible, or at most on a few key issues. *Id.* at 751-52. Petitioner must show that his counsel
24 unreasonably failed to discover and file nonfrivolous issues. *Delgado v. Lewis*, 223 F.3d 976, 980
25 (9th Cir. 2000). It is inappropriate to focus on what could have been done rather than focusing on
26 the reasonableness of what counsel did. *Williams v. Woodford*, 384 F.3d 567, 616 (9th Cir. 2004)
27 (citation omitted).

1 In the amended petition filed in this action, petitioner asserts that his Sixth Amendment right
 2 to the effective assistance of counsel was violated because: (a) trial counsel failed to compel
 3 discovery or investigate the loss of exculpatory evidence; (b) trial counsel failed to effect “sound
 4 strategy” regarding the defense of mistaken identity; (c) trial counsel failed to subject the
 5 prosecution to meaningful adversarial testing through cross-examination and objection; (d) trial
 6 counsel filed motions that misstated the facts; (e) trial and appellate counsel failed to object to the
 7 admission of unsubstantiated prior convictions regarding the habitual criminal adjudication; and (f)
 8 trial and appellate counsel failed to interview potential witnesses. (ECF No. 13, at pp. 3-4).
 9 Petitioner presented these claims in his state post-conviction habeas petition. (Exhibit 49). The
 10 state district court rejected petitioner’s claims. (Exhibit 52). On appeal from the denial of his state
 11 habeas petition, the Nevada Supreme Court affirmed the denial of petitioner’s claims, as follows:

12 First, appellant claimed that counsel was ineffective for failing to
 13 compel discovery or investigate when discovery had been lost.
 14 Appellant failed to demonstrate that counsel was deficient or that he
 15 was prejudiced. Counsel challenged the lack of voluntary witness
 16 statements and a missing report prior to trial. The State claimed that
 17 there were no witness statements and that after a search of both the
 18 State’s files and police files, the report did not exist. The district
 19 court determined that the statements and the report likely did not
 20 exist, and that if they were discovered later, the State would not be
 21 allowed to use them against appellant. Further, appellant failed to
 22 demonstrate a reasonable probability of a different outcome at trial
 23 had counsel compelled further discovery or investigated the alleged
 24 lost evidence. Therefore, the district court did not err in denying this
 25 claim.

26 Appellant also claimed that counsel was ineffective for failing to
 27 effect sound strategy, failing to correctly state facts in pretrial
 28 motions, failing to object to the admission of prior convictions at
 sentencing, and failing to interview the victims or the police involved.
 Appellant failed to support these claims with specific facts that, if
 true, would entitle him to relief. Hargrove v. State, 100 Nev. 498,
 502, 686 P.2d 222, 225 (1984). Therefore, the district court did not
 err in denying these claims.

(Exhibit 59, at p. 2). The factual findings of the state court are presumed correct. 28 U.S.C. §
 2254(e)(1). This court has reviewed each of petitioner’s sub-claims within ground 1. As to the first
 sub-claim, that trial counsel failed compel discovery or investigate the loss of exculpatory evidence,
 the state court record belies petitioner’s claim. (*See* Exhibit 25A). Petitioner has failed to

1 demonstrate that his counsel's performance was deficient or that he was prejudiced under
2 *Strickland*. Petitioner's remaining sub-claims within ground 1 are too vague and conclusory to
3 warrant relief. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994). Although petitioner alleges that
4 trial counsel failed to effect "sound trial strategy" or subject the prosecution to meaningful
5 adversarial testing, he does not explain what actions trial counsel should have taken or how those
6 actions would have changed the result of the trial. While petitioner alleges that counsel filed
7 motions that included incorrect facts, petitioner fails to explain what facts presented in those
8 motions were wrong or how correcting such facts would have changed the result of the trial.
9 Petitioner asserts that trial and appellate counsel were ineffective for failing to object to
10 "unsubstantiated prior convictions" for the purpose of habitual criminal adjudication, but he does
11 not specify which of his convictions should have been challenged or explain what basis counsel had
12 to challenge them. Finally, petitioner alleges that trial and appellate counsel failed to interview
13 potential witnesses. As to trial counsel, petitioner fails to identify which potential witnesses should
14 have been interviewed or explain what additional evidence such witnesses would have provided that
15 would have changed the result of the trial. As to appellate counsel, petitioner fails to identify any
16 omitted issue regarding potential witnesses that would have had a reasonable probability of success
17 on appeal. Because petitioner failed to make specific factual allegations which, if true, would have
18 entitled him to relief, the Nevada Supreme Court acted reasonably in summarily disposing of those
19 claims. Petitioner has failed to demonstrate that his trial or appellate counsel's performance was
20 deficient or that he was prejudiced under *Strickland*. Petitioner has failed to meet his burden of
21 proving that the Nevada Supreme Court's ruling was contrary to, or involved an unreasonable
22 application of, clearly established federal law, as determined by the United States Supreme Court, or
23 that the ruling was based on an unreasonable determination of the facts in light of the evidence
24 presented in the state court proceeding. The court denies habeas relief as to the entirety of ground 1.

25 **B. Ground 7**

26 Petitioner contends that his sentence of ten years to life in prison, based on his adjudication
27 as a habitual criminal, amounts to cruel and unusual punishment in violation of the Eighth
28 Amendment to the United States Constitution. (ECF No. 13, at pp. 25-26). The United States

Supreme Court has held that the Eighth Amendment contains a “narrow proportionality principle.” *Graham v. Florida*, 560 U.S. 48, 59-60 (2010) (internal quotation marks omitted). This principle “does not require strict proportionality between the crime and the sentence but rather forbids only extreme sentences that are grossly disproportionate to the crime.” *Id.* (internal quotations omitted). Still, it is exceptionally difficult for a defendant to show that his sentence is unconstitutionally disproportionate. Several United States Supreme Court cases dictate upholding defendants’ sentence, even where the sentence seems harsh in light of the offense committed. *Ewing v. California*, 538 U.S. 11 (2003) (upholding 25-year sentence of habitual criminal defendant for stealing three golf clubs, holding that the states may dictate how they wish to deal with recidivism issues); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (50-years-to-life sentence for stealing \$150 of videotapes upheld under California’s three-strikes law); *Hutto v. Davis*, 454 U.S. 370 (1982) (40-year prison sentence upheld where defendant was convicted of possession with intent to sell nine ounces of marijuana); *Rummel v. Estelle*, 445 U.S. 263 (1980) (life sentence upheld where defendant was repeated offender and committed third felony of stealing \$120).

Petitioner presented his Eighth Amendment claim on direct appeal to the Nevada Supreme Court. (Exhibit 37, at pp. 13-15). The Nevada Supreme Court denied the claim, as follows:

[A]ppellant contends that his sentence for burglary constitutes cruel and unusual punishment. Based on appellant’s prior convictions, he was adjudicated a habitual criminal and sentenced to life in prison with the possibility of parole. Because the sentence falls within statutory limits, see NRS 205.060, NRS 207.010, and is not unduly disproportionate to the crime, the punishment is not cruel and unusual. See *Allred v. State*, 120 Nev. 410, 421, 92 P.3d 1246, 1254 (2004).

(Exhibit 44, at pp. 3). The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner’s sentence is not unduly disproportionate to his crimes, particularly considering his adjudication as a habitual criminal. Petitioner has failed to meet his burden of proving that the Nevada Supreme Court’s ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Federal habeas relief is denied as to ground 2 of the amended petition.

1 **IV. Certificate of Appealability**

2 District courts are required to rule on the certificate of appealability in the order disposing of
 3 a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal and
 4 request for certificate of appealability to be filed. Rule 11(a). In order to proceed with his appeal,
 5 petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th
 6 Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v.*
 7 *Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make “a substantial
 8 showing of the denial of a constitutional right” to warrant a certificate of appealability. *Id.*; 28
 9 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must
 10 demonstrate that reasonable jurists would find the district court's assessment of the constitutional
 11 claims debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold
 12 inquiry, the petitioner has the burden of demonstrating that the issues are debatable among jurists of
 13 reason; that a court could resolve the issues differently; or that the questions are adequate to deserve
 14 encouragement to proceed further. *Id.* In this case, no reasonable jurist would find this court’s
 15 denial of the petition debatable or wrong. The court therefore denies petitioner a certificate of
 16 appealability.


17 **V. Conclusion**

18 **IT IS THEREFORE ORDERED** that the amended petition for a writ of habeas corpus is
 19 **DENIED.**

20 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
 21 **APPEALABILITY.**

22 **IT IS FURTHER ORDERED** that the clerk of court **SHALL ENTER JUDGMENT**
 23 **ACCORDINGLY.**

24 Dated December 17, 2015.

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 26
 27 
 28 UNITED STATES DISTRICT JUDGE